

IN THE
MISSOURI SUPREME COURT

DARIUS NICHOLSON,)	
)	
Appellant,)	
)	
v.)	No. SC 86143
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF CAPE GIRARDEAU COUNTY, MISSOURI
THIRTY-SECOND JUDICIAL CIRCUIT, DIVISION II
THE HONORABLE JOHN W. GRIMM, JUDGE AT TRIAL
THE HONORABLE JOHN P. HEISSERER,
JUDGE AT POST-CONVICTION PROCEEDINGS

APPELLANT’S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Following a change of venue from the Circuit Court of Scott County to the Circuit Court of Cape Girardeau County, a jury found Appellant Darius Nicholson guilty of the class A felony of murder in the second degree in violation of § 565.021, RSMo (Count I), the unclassified felony of armed criminal action in violation of § 571.015, RSMo (Count II), and the class A felony of robbery in the first degree in violation of § 569.020, RSMo (Count III).¹ The Honorable John W. Grimm, Judge of Division II sentenced appellant to concurrent terms of life imprisonment (Count I) and thirty years of imprisonment (Counts II and III) in the Missouri Department of Corrections. Appellant appealed his convictions to the Missouri Court of Appeals, Eastern District, which affirmed the judgments and sentences against him. *State v. Nicholson*, 84 S.W.3d 491 (Mo. App. E.D. 2002). The mandate was issued on October 9, 2002.

Appellant filed his *pro se* motion for post-conviction relief with the City of St. Louis Circuit Court on January 6, 2003. His motion was then sent to and then filed by the Cape Girardeau Circuit Court (motion court) on January 9, 2003. On June 3, 2003, the motion court dismissed appellant's post-conviction motion as untimely filed. The Eastern District affirmed this ruling by opinion rendered May 25, 2004. This Court granted transfer on August 24, 2004 pursuant to Missouri Supreme Court Rule 83.04, and therefore jurisdiction lies in this Court. Mo. Const., Art. V, § 10.

¹ All statutory references are to RSMo 1994, as amended through 1998, unless otherwise indicated.

STATEMENT OF FACTS

In the Circuit Court of Scott County, the State of Missouri charged that Appellant Darius Nicholson committed the felonies of murder in the first degree (Count I), armed criminal action (Count II), and robbery in the first degree (Count III), by robbing and killing Charles Garrett on June 6, 1998 [L.F. 23-24, 42-43].² The court ordered a change of venue to Cape Girardeau County, where the Honorable John W. Grimm, Judge of Division II, presided over a jury trial held June 4-6, 2001 [L.F. 3, 6, 17-19, 211-212].

The jury convicted appellant of murder in the second degree (Count I), armed criminal action (Count II) and robbery in the first degree (Count III) [L.F. 200-202]. On August 27, 2001, the court sentenced appellant to concurrent terms of life imprisonment (Count I) and thirty years of imprisonment (Counts II and III) in the Missouri Department of Corrections [L.F. 20, 215-216]. Appellant appealed his convictions to the Missouri Court of Appeals, Eastern District, which affirmed the judgment and sentences against him [L.F. 232-35]. *State v. Nicholson*, 84 S.W.3d 491 (Mo.App. E.D. 2002). The mandate was issued on October 9, 2002 [PCR Supp. 4].

Appellant filed his *pro se* motion for post-conviction relief in the circuit court for St. Louis City on January 6, 2003 [PCR L.F. 3-15]. His motion was then stamped filed

² Appellant will cite to the record on appeal as follows: ED80084 Direct Appeal Legal File, “[L.F.],” and Transcript, “[Tr.];” and ED83190 Post-conviction Legal File, “[PCR L.F.],” and Post-conviction Supplemental Legal File “[PCR Supp.].”

with the Cape Girardeau Circuit Court on January 9, 2003 [PCR L.F. 1, 3-15]. The motion court appointed counsel on January 17, 2003 [PCR L.F. 1].

On May 19, 2003, the State filed its Opposition to Movant's Motion to Vacate, Set Aside or Correct the Judgment and Sentence [PCR Supp. 1-3], contending that appellant's *pro se* motion was untimely filed [PCR Supp. 1]. Appellant filed a Motion to Allow Movant to Proceed with Post-Conviction Motion Despite Untimely Filing of Pro Se Motion on May 16, 2003, acknowledging that file stamps on the *pro se* motion indicated it was filed in St. Louis City on January 6, 2003 and in Cape Girardeau County on January 9, 2003, but that under Rule 29.15(b), his *pro se* motion was due on January 7, 2003 [PCR L.F. 1; PCR Supp. 4-5]. Appellant also filed a Memorandum Regarding Timeliness of Movant's Pro Se Motion on June 2, 2003, arguing that the court should consider his *pro se* motion for post-conviction relief timely filed [PCR L.F. 2; PCR Supp. 9-13].

On June 3, 2003, the motion court dismissed appellant's post-conviction motion as untimely filed [PCR L.F. 19]. The motion court's order, in its entirety, states:

Now on this 3rd day of June, 2003, the court having reviewed the file and memorandum of counsel does find that the PCR motion filed by Plaintiff on January 9, 2003 with the clerk of the trial court was untimely filed and the failure to file said motion within 90 days of the Court of Appeals [sic] mandate pursuant to Supreme Court Rule 24.035(b) [sic] deprives this court of jurisdiction to consider same. It is therefore ordered

that Plaintiff's motion be and is hereby dismissed with
prejudice.

[PCR L.F. 2, 19; A-1].

This appeal follows [PCR L.F. 22-25]. To avoid unnecessary repetition,
additional facts may be set forth in the Argument portion of this brief.

POINT RELIED ON

I.

The motion court clearly erred in dismissing appellant's *pro se* Rule 29.15 motion as untimely filed because that ruling violated appellant's rights to due process of law and access to the courts, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 14 of the Missouri Constitution, and the record leaves the firm impression that a mistake has been made, in that the motion court's own records, as reflected on the date stamp on the *pro se* motion, indicate that the motion was timely filed on January 6, 2003. That appellant filed his *pro se* motion initially in the Circuit Court of the City of St. Louis instead of the Circuit Court of Cape Girardeau County should not render his otherwise timely filed motion untimely. Under § 476.410, RSMo 2000 and Rule 51.10, the Circuit Court of Cape Girardeau County should have treated Nicholson's motion as though it had originally been filed in that circuit. Further, this Court's time limitations contained in its post-conviction rules and purposes of these time limits are not violated when the *pro se* motion is filed within the time required by the post-conviction rules in a circuit court of this state.

Wallingford v. State, 131 S.W.3d 781 (Mo. banc 2004);

Day v. State, 770 S.W.2d 692 (Mo. banc 1989);

Thomas v. State, 808 S.W.2d 364 (Mo. banc 1991);

State ex. rel. Director of Revenue v. Gaertner, 32 S.W.3d 564 (Mo. banc 2000);

Rules 29.15 and 51.10;

§ 476.410, RSMo 2000;

Mo. Const., Art. I, §§ 10 and 14; and

U.S. Const., Amends. V, VI and XIV.

ARGUMENT

I.

The motion court clearly erred in dismissing appellant's *pro se* Rule 29.15 motion as untimely filed because that ruling violated appellant's rights to due process of law and access to the courts, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 14 of the Missouri Constitution, and the record leaves the firm impression that a mistake has been made, in that the motion court's own records, as reflected on the date stamp on the *pro se* motion, indicate that the motion was timely filed on January 6, 2003. That appellant filed his *pro se* motion initially in the Circuit Court of the City of St. Louis instead of the Circuit Court of Cape Girardeau County should not render his otherwise timely filed motion untimely. Under § 476.410, RSMo 2000 and Rule 51.10, the Circuit Court of Cape Girardeau County should have treated Nicholson's motion as though it had originally been filed in that circuit. Further, this Court's time limitations contained in its post-conviction rules and purposes of these time limits are not violated when the *pro se* motion is filed within the time required by the post-conviction rules in a circuit court of this state.

This Court must examine the meaning of the language of Rule 29.15(a), that a post-conviction movant must, at possible risk of permanent dismissal, file the *pro se* motion for post-conviction relief only in the sentencing court, as to apply that literally would conflict with § 476.410, RSMo, 2000 which requires transfer of a case filed in an

improper venue to the proper court, and Rule 51.10, which requires that the proper court treat a case transferred as though it had originated there.

The motion court clearly erred in dismissing appellant's *pro se* Rule 29.15 motion for post-conviction relief as untimely filed. Rules 24.035 and 29.15, pertaining to the state-created post-conviction remedy following a defendant's plea or determination of guilt, are civil rules. Section 476.410 and Rule 51.10 should operate to permit a post-conviction motion timely filed in the wrong circuit and transferred to the correct circuit to be treated as though originally filed in the proper court, as would be done with any other civil action. This Court should eliminate what would be in this circumstance a double standard applied to pleadings filed by post-conviction movants and allow movants to benefit from civil rules of procedure followed in other civil matters. The rationale behind the progeny of cases enforcing the time limitations for filing *pro se* post-conviction motions, to avoid delays and prevent litigation of state claims, *Day v. State*, 770 S.W.2d 692, 693 (Mo. banc 1989), will not be affected by application of § 476.410 and Rule 51.10 to post-conviction pleadings. To the contrary, there will be no delay in litigating the post-conviction action, and the *pro se* litigant will have their day in court to review the propriety of judgment and sentence.

Standard of Review

Appellate review of the dismissal of a motion for post-conviction relief under Rule 29.15 “is limited to the determination of whether the findings and conclusions of the trial court are clearly erroneous.” *Day v. State*, 770 S.W.2d at 695. The findings and conclusions of a motion court are clearly erroneous “only if, after a review of the entire

record, the reviewing court is left with the definite and firm impression that a mistake has been made.” *Rotellini v. State*, 77 S.W.3d 632, 634 (Mo. App. E.D. 2002).

Facts

That a mistake has been made is evident from the record of the post-conviction proceedings. Appellant appealed his convictions to the Missouri Court of Appeals, Eastern District, which affirmed the judgments and sentences against him [L.F. 232-35]. *State v. Nicholson*, 84 S.W.3d 491 (Mo. App. E.D. 2002). The mandate was issued on October 9, 2002 [PCR Supp. 4].

The motion court’s own records, as reflected by the date stamp on the *pro se* motion, indicates that the motion was timely filed [PCR L.F. 3]. Appellant’s *pro se* motion has two date stamps on it: first, a stamp reading, “FILED JAN 06 2003 MARIANO V. FAVAZZA CIRCUIT CLERK BY DEPUTY CLERK”; second, a stamp reading “FILED JAN 09 2003 CHARLES P. HUTSON CIRCUIT CLERK” [PCR L.F. 3]. Mariano V. Favazza is the Circuit Clerk of the City of St. Louis; Charles P. Hutson is the Circuit Clerk of Cape Girardeau County. The motion court appointed counsel on January 17, 2003 [PCR L.F. 1].

On May 19, 2003, the State filed its Opposition to Movant’s Motion to Vacate, Set Aside or Correct the Judgment and Sentence [PCR Supp. 1-3]. In its Opposition, the State contended that appellant’s *pro se* motion was untimely filed [PCR Supp. 1]. Appellant filed a Motion to Allow Movant to Proceed with Post-Conviction Motion Despite Untimely Filing of Pro Se Motion on May 16, 2003, acknowledging that stamps on the *pro se* motion indicated it was filed in St. Louis City on January 6, 2003 and in

Cape Girardeau County on January 9, 2003, but that under Rule 29.15(b), his *pro se* motion was due on January 7, 2003 [PCR L.F. 1; PCR Supp. 4-5]. Appellant also filed a Memorandum Regarding Timeliness of Movant's Pro Se Motion on June 2, 2003, arguing that the motion court should consider his *pro se* motion for post-conviction relief timely filed [PCR L.F. 2; PCR Supp. 9-13].

On June 3, 2003, the motion court dismissed the post-conviction motion as untimely filed [PCR L.F. 19]. The motion court's order, in its entirety, states:

Now on this 3rd day of June, 2003, the court having reviewed the file and memorandum of counsel does find that the PCR motion filed by Plaintiff on January 9, 2003 with the clerk of the trial court was untimely filed and the failure to file said motion within 90 days of the Court of Appeals [sic] mandate pursuant to Supreme Court Rule 24.035(b) [sic] deprives this court of jurisdiction to consider same. It is therefore ordered that Plaintiff's motion be and is hereby dismissed with prejudice.

[PCR L.F. 2, 19; A-3].

Appellant appealed the dismissal of his post-conviction motion to the Missouri Court of Appeals, Eastern District, which on May 25, 2004 determined that it did not have jurisdiction to consider the appeal and dismissed it. On August 24, 2004, this Court accepted transfer of the matter. For the reasons stated herein, appellant requests that this

Court reverse the motion court's dismissal of his Rule 29.15 post-conviction motion and remand for further proceedings.

Argument

Contrary to the motion court's assertion, appellant's failure to initially file his *pro se* motion in the Circuit Court of Cape Girardeau County does not render the motion untimely filed, since he filed the motion in the Circuit Court of the City of St. Louis within the time allotted under Rule 29.15(b). The motion court's ruling has deprived appellant of his rights to due process of law and access to the courts, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 14 of the Missouri Constitution, and has denied appellant the opportunity to seek relief under the exclusive remedy available to him to challenge his meritorious claims of ineffective assistance of trial and appellate counsel raised in his *pro se* motion.

A. Right to Pursue Post-Conviction Remedy

Although the Due Process Clause of the Fifth Amendment to the United States Constitution does not establish any right to collaterally attack a final judgment or conviction, *United States v. MacCollum*, 426 U.S. 317, 323, 96 S.Ct. 2086, 48 L.Ed.2d 666 (1976), state statutes can create interests that are entitled to procedural due process protection under the Fourteenth Amendment. *Vitek v. Jones*, 445 U.S. 480, 488, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980). While one may not have a constitutional or inherent right to a particular liberty interest, once a state has afforded the opportunity for that interest, due process protections must be invoked to ensure that the state-created right is not arbitrarily denied or abrogated. *Id.* at 488-89.

The Supreme Court has indicated that post-conviction remedies may be a right within the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In *Young v. Ragen*, 337 U.S. 235, 238-39, 69 S.Ct. 1073, 93 L.Ed. 1333 (1949), the Court recognized that the principle of exhaustion of state remedies presupposes that some adequate state remedy exists. The Court also suggested that states must provide some vehicle by which prisoners may raise claims of a denial of federal rights. *Id.* at 239. *Young* was cited with approval by Justice Clark in his concurring opinion in *Case v. Nebraska*, 381 U.S. 336, 338, 85 S.Ct. 1486, 14 L.Ed.2d 422 (1965), recommending that all states enact some post-conviction remedy statute in order to “relieve the federal courts of this ever-increasing burden” of habeas corpus petitions in state and federal courts. *Id.* at 339-40. As noted by this Court, “Missouri was one of the first states to adopt a special procedure for post-conviction review.” *Day v. State*, 770 S.W.2d at 693.

By promulgating Rule 29.15, this Court has created a means for a convicted felon confined in a correctional facility to challenge his conviction or sentence.³ *Day v. State*, 770 S.W.2d at 693. Thus, a prisoner in Missouri has a lawfully created interest in pursuing a post-conviction action, and any arbitrary deprivation of that interest would violate due process. *See Vitek v. Jones*, 445 U.S. at 488-89.

³ While there is a state statute enacted providing for post-conviction review, Section 547.360, the Missouri Supreme Court Rules control the process for review and litigation of post-conviction remedies. *Schleeper v. State*, 982 S.W.2d 252 (Mo. banc 1998).

With the state-created right to petition the court for a post-conviction remedy comes a concomitant right of access to the courts. In *Bounds v. Smith*, 430 U.S. 817, 821, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977), the United States Supreme Court acknowledged that “beyond doubt . . . prisoners have a constitutional right to access to the courts.” Such “access to the courts” must be “adequate, effective, and meaningful.” *Id.* at 822.

B. Timeliness Requirement for Pro Se Post-Conviction Motions

Rule 29.15 “provides the exclusive procedure” by which a prisoner may seek post-conviction relief “in the sentencing court.” Rule 29.15(a). Under Rule 29.15(b), a post-conviction movant must file his or her motion to vacate, set aside, or correct the judgment or sentence within 90 days after the date that the mandate of the appellate court issues. The rule states that “[f]ailure to file a motion within the time provided by this Rule 29.15 shall constitute a complete waiver of any right to proceed under this Rule 29.15 and a complete waiver of any claim that could be raised in a motion filed pursuant to this Rule 29.15.” Rule 29.15(b).

Appellant recognizes that the Missouri Supreme Court has rejected constitutional challenges to the time limits set forth in Supreme Court Rule 29.15. *See, e.g., Day v. State*, 770 S.W.2d at 695. The Missouri Supreme Court created the time limits for filing post-conviction motions “[t]o avoid . . . delays and to prevent litigation of stale claims,” and has determined that compliance with the time limits is “mandatory.” *Day v. State*, 770 S.W.2d at 693. However, the motion court’s determination in this case that appellant’s *pro se* motion was “untimely filed” is clearly erroneous.

This Court issued its mandate affirming appellant's judgment and sentence on October 9, 2002 [PCR Supp. 4]. Thus, appellant's *pro se* motion was due on or before Tuesday, January 7, 2003. Rule 29.15(b). As previously noted, appellant's *pro se* motion was filed with the Circuit Court of the City of St. Louis on January 6, 2003, and was then transferred by that court and filed with the Circuit Court of Cape Girardeau County on January 9, 2003 [PCR L.F. 3]. Thus, the filing of the motion in the Circuit Court of the City of St. Louis occurred before the due date.

As noted in *Broom v. State*, “[i]n determining the timeliness of filing [a *pro se* Rule 29.15 motion], the date of receipt is crucial.” 111 S.W.3d 563, 566 (Mo. App. W.D. 2003) (certified mail receipt indicated court received *pro se* post-conviction motion within time limits for filing the motion). “The date a document is stamped as being received is evidence of the date of receipt.” *Phelps v. State*, 21 S.W.3d 832, 833 (Mo. App. E.D. 1999); *see also Jameson v. State*, 125 S.W.3d 885, 888-89 (Mo. App. E.D. 2004); *Unnerstall v. State*, 53 S.W.3d 589, 591 (Mo. App. E.D. 2001); *Goodson v. State*, 978 S.W.2d 363, 364 (Mo. App. E.D. 1998). Here, where appellant has a date stamp on his *pro se* motion indicating it was filed with the Circuit Court of the City of St. Louis before its due date, the motion court should have considered appellant's motion as timely filed. [See PCRLF 1, 3]. That appellant failed to initially file his *pro se* motion in the “sentencing court,” Rule 29.15(a), should not be a jurisdictional bar to post-conviction relief where the motion was otherwise timely filed and the error was remedied.

The dual date stamps on appellant's *pro se* motion indicate that the Circuit Court of the City of St. Louis, recognizing that appellant filed his *pro se* motion in the improper

venue, transferred his case to the Circuit Court of Cape Girardeau County [PCR L.F. 3]. The City of St. Louis Circuit Court's handling of this matter was appropriate under § 476.410, which require transfer of a civil action filed in the improper venue to the proper circuit court.

Significantly, § 476.410 requires “[t]he division of a circuit court in which a case is filed laying venue in the wrong division or wrong circuit shall transfer the case to any division or circuit in which it could have been brought.” “Prior to the enactment of § 476.410, improper venue required dismissal of the action.” *Keltner v. Keltner*, 950 S.W.2d 690, 691 (Mo. App. S.D. 1997). Following the enactment of § 476.410, a circuit court in which a pleading was erroneously filed has “limited jurisdiction . . . to transfer any case filed in an improper venue to any circuit court otherwise designated by the legislature to hear the particular matter.” *State ex. rel. Director of Revenue v. Gaertner*, 32 S.W.3d 564, 567-68 (Mo. banc 2000). A civil action which has been so transferred “shall be treated and determined as if it had originated in the receiving court.” Rule 51.10 (emphasis added). Dismissal is inappropriate. *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 197 (Mo. banc 1991).

Because § 476.410 requires transfer of a case filed in the wrong circuit to the proper court, and Rule 51.10 requires that the proper court treat the case as though it had originated there, the Circuit Court of Cape Girardeau County should have treated appellant's *pro se* motion as though it was timely filed in its court on January 6, 2003. Section 476.410 and Rule 51.10 should require this Court to find that movant timely

initiated the post-conviction process by filing his motion within the relevant time frame of the rules in a circuit court.

C. Civil Rules Apply to Post-Conviction Proceedings

At issue here is whether the Rules of Civil Procedure permitting transfer of a civil action filed in an improper venue to the proper court apply equally to post-conviction proceedings. The rules of civil procedure govern post-conviction proceedings “insofar as applicable.” Rule 29.15(a). *See also Griffin v. State*, 529 S.W.2d 665, 676 (Mo. App. St.L.D. 1975) (dismissing appeal of denial of post-conviction motion because notice of appeal was untimely filed). To state it another way, “[a] motion filed under th[e] rule to vacate a judgment of conviction is not a step in a criminal proceeding against the defendant,” therefore, “[t]he [post-conviction] proceeding is governed by Court rules applicable to civil proceedings.” *State v. Floyd*, 403 S.W.2d 613, 615 (Mo. 1966) (emphasis added).

Whether the civil rules of procedure are “applicable” in the context of post-conviction proceedings depends on whether the “rule ‘enhances, conflicts with, or is of neutral consequence to the purposes of’ Rules 29.15 or 24.035.” *State v. Reber*, 976 S.W.2d 450, 451 (Mo. banc 1998) (quoting *Thomas v. State*, 808 S.W.2d 364, 366 (Mo. banc 1991)). “If the rule enhances or is of neutral consequence to the purposes of Rules 29.15 or 24.035, then that rule is applicable. If the rule conflicts with the purposes of Rules 29.15 or 24.035, then that rule is not applicable.” *Reber*, 976 S.W.2d at 451 (citing *Thomas* at 366) (finding Rule 74.01 requirement that order be denominated “judgment” to be final for purposes of appeal inapplicable to post-conviction proceedings where Rule

29.15(k) states that an “order” disposing of post-conviction proceeding is deemed a final judgment).

A more recent example in which civil rules were held applicable to post-conviction proceedings is this Court’s decision in *Wallingford v. State*, 131 S.W.3d 781 (Mo. banc 2004). There, the state argued and the motion court found that movant’s *pro se* motion, which was not signed, did not confer jurisdiction in the motion court, and the motion court dismissed. The Supreme Court reversed, noting that the civil rules are applicable to civil cases such as post-conviction actions, and Rule 55.03 (a) allows for a party to correct the failure to sign a *pro se* pleading when done promptly after the defect is called to the attention of the party or his or her attorney. *Id.* at 781-782.

Here, appellant is not arguing that the Circuit Court of the City of St. Louis had jurisdiction to decide the *merits* of his Rule 29.15 motion. *Cf. Plant v. Haynes*, 568 S.W.2d 585 (Mo. App. K.C.D. 1978) (finding that Circuit Court of Cole County exceeded its jurisdiction by granting relief on post-conviction motion which should have been filed in the City of St. Louis and St. Charles County, where the movant was sentenced). However, under § 476.410, the Circuit Court of the City of St. Louis did what it was supposed to do, it “... transfer[red] the case to any division or circuit in which it could have been brought,” and the transfer to Cape Girardeau County was proper. Once transferred, under Rule 51.10, the Circuit Court of Cape Girardeau County was required to treat and determine his motion “as if it had originated in the receiving court,” i.e., as though it were timely filed. Therefore, cases that suggest that the failure to file a motion for post-conviction relief in the proper venue deprives the court of

jurisdiction over the matter fail to acknowledge the application of § 476.410 and Rule 51.10, as upon proper transfer of the case the sentencing court would retain jurisdiction over the matter.

It is difficult to ascertain how application of the civil rules permitting transfer of civil action filed in the improper venue to the proper circuit court would “conflict” with the purpose of Rule 29.15 “[t]o avoid . . . delays and to prevent litigation of stale claims,” *Day v. State*, 770 S.W.2d at 693. Claims raised in a *pro se* motion promptly filed in an improper circuit court do not become “stale” even if not transferred to the proper circuit until after the due date just as claims raised in a *pro se* motion filed in the proper court do not become stale when, as is often the case, months after the motion was filed the court still has not appointed counsel, held an evidentiary hearing, or ruled on the motion. By filing the *pro se* motion in a circuit court before the due date imposed in Rule 29.15, appellant attempted to comply with the post-conviction rules. Although it was a different judge who dismissed appellant’s post-conviction motion than who sentenced appellant, the change of judge had nothing to do with when appellant’s motion was filed—had he filed it on January 6, 2003 in Cape Girardeau County, it still would have been Judge Heisserer who ruled on his motion, as Judge Grimm had left his position with the Circuit Court [PCR L.F. 1]. *Cf. Thomas v. State*, 808 S.W.2d 364, 367 (Mo banc 1991) (finding Rule 55.01 permitting change of judge upon request inapplicable to post-conviction proceedings as its application would “foster[] unnecessary delay”).

D. Sentencing Court

The post-conviction rules were enacted to provide a proper forum to fully litigate rights formally reserved to habeas corpus litigation. The rules thereby do not suspend rights to challenge the validity of a judgment and sentence under habeas corpus, but rather mandate the proper procedure to be followed and the proper venue for litigating those rights, and the sentencing court is the forum denoted by the rules to litigate these rights. *See Wigglesworth v. Wyrick*, 531 S.W.2d 713, 721-723 (Mo. banc 1976). Under habeas corpus, the appropriate venue and forum is where the petitioner is detained. Rule 91.02(a). However, the sentencing court, where a post-conviction movant's judgment and sentence occurred, is the appropriate forum to litigate the validity of the judgment and sentence for obvious reasons, many noted by this Court in *Thomas v. State*, 808 S.W.2d at 366-367: the sentencing court is "best acquainted with the case and its conduct from considerations of claims relating to trial counsel's representation of the convicted defendant." *Id.* Further, the witnesses, trial records, the evidence or other facts that will be needed to be presented at an evidentiary hearing invariably are located in the venue of the sentencing court. *See State v. Meeks*, 635 S.W.2d 14, 17 (Mo. banc 1982). Finally, as this Court noted in *Thomas*, an automatic change of judge will "foster unnecessary delay ... [as a new] motion court must carefully consider the entire trial from the record to consider the rule 29.15 motion properly. This is neither an easy, nor swift process; asking a new judge to hear the motion builds the very delay Rules 24.035 and 29.15 are designed to eliminate." *Thomas*, 808 S.W.2d at 367.

Another civil rule at odds with and hindering the purposes of the post-conviction rules, and therefore not applicable, is Rule 67.01, allowing a party in a civil proceeding to dismiss the action without prejudice. It cannot be applied to the post-conviction rules since if it was, it would “circumvent the time constraints” set forth in the post-conviction rules, *Mack v. State*, 775 S.W.2d 288, 292 (Mo. App., E.D. 1989), not to mention subsection (l) of the rules prohibiting filing successive motions.

Yet, as previously noted, this Court recently, in *Wallingford, supra*, determined Rule 55.03(a) applied to allow a *pro se* movant who failed to sign his *pro se* motion to correct the defect, which was a correct holding under the theory a civil rule is applicable to the postconviction rules unless it hinders the purposes of the post-conviction rules. Obviously, allowing correction of minor defects does not hinder the rules.

So it should be held here, with the “filed in the sentencing court” language of the rule. By filing his motion timely in circuit court, the concerns for delays in filing and litigating stale claims noted in *Day* are obviated. The quick (three day) transfer of this case from St. Louis City to Cape Girardeau, the sentencing court, as required by Section 476.410, resulted in no delay to the proceedings, and application of this statute and Rule 51.10, treating transferred cases as if originating in the receiving court, is not inimical to the post-conviction rules, and in fact ensures rights to challenge judgment and sentence formerly reserved to habeas corpus are not unreasonably suspended by a technicality.

***E. Application of § 476.410 and Rule 51.10
to Post-Conviction Movants is Fair***

As noted, the primary purpose of the time requirements is to prevent stale claims and insure finality of litigation in an expeditious manner; therefore, movants seeking post-conviction relief must insure that they do not delay in filing their pleadings, and get them filed within the time frame of the rules. Appellant did just that, albeit by inadvertently sending his motion to the incorrect court, which is not surprising since *pro se* litigants with little to no education, possible mental problems, and certainly no legal training are left to their own devices to initiate the post-conviction process. Nevertheless, appellant tried and did timely file his *pro se* motion in a circuit court, within the parameters of Rule 29.15.

The challenges an inmate faces in preparing *pro se* legal pleadings have long been recognized by the United States Supreme Court. For example, in *Johnson v. Avery*, 393 U.S. 483, 487, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969), the Court noted that “[j]ails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited.” Where “the initial burden of presenting a claim to post-conviction relief usually rests upon the indigent prisoner himself” the post-conviction movant must prepare and file the initial motion on his own, or “with such help as he can obtain within the prison walls or the prison system.” *Id.* at 488. As a result, “[i]n the case of all except those who are able to help themselves--usually a few old hands or exceptionally gifted prisoners--the prisoner is, in effect, denied access to the courts

unless such help is available” *Id.* at 488, 490 (finding invalid a Tennessee state prison regulation prohibiting prisoners from obtaining help from jailhouse lawyers in preparing their petitions for writs of habeas corpus). Although jail house lawyers can be found in Missouri, such assistance may come at a price, and their “legal advice” can be quite suspect. It is not until the movant successfully files his post-conviction motion in the sentencing court and the court appoints counsel that the indigent movant truly receives knowledgeable legal assistance.

The Missouri Court of Appeals, Eastern District, noted in *Adail v. State*, 612 S.W.2d 6, 7-8 (Mo. App. E.D. 1980) that a post-conviction “[m]ovant is bound by the same standard of compliance with trial and appellate court rules and procedures as those who are admitted to the practice of law” (finding *pro se* brief that did not comply with appellate rules without merit). Yet, if it is determined that post-conviction movants must timely file their *pro se* motions in the proper venue upon penalty of permanent dismissal, but permitting transfer of pleadings filed in the improper venue in other civil actions, the courts of this state would hold the *pro se* post-conviction movant who petitions the court to seek appointment of counsel and competent legal assistance to a higher standard than that of attorneys representing parties in other civil actions.

The Court in *Johnson* stated, “it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed.” 393 U.S. at 485. By applying more stringent requirements to appellant in his quest for post-conviction review than the courts would apply to other civil litigants, the motion

court has unduly obstructed appellant's access to the courts and arbitrarily denied appellant his right to pursue the post-conviction remedy, the sole remedy to litigate fundamental Sixth and Fourteenth Amendment issues relating to adequacy of trial and appellate counsel. *See State v. Wheat*, 775 S.W.2d 155 (Mo. banc 1989). "[P]ost-conviction proceedings must be more than a formality." *Johnson*, 393 U.S. at 486. Yet for appellant, the quest for post-conviction review permitted by the rules has eluded him due to his failure to file an otherwise timely Rule 29.15 motion in the proper venue. This Court should reverse the dismissal of appellant's Rule 29.15 motion, and permit him to proceed on his post-conviction motion.⁴

⁴ This Court has shown a willingness to open Missouri courts for review of important constitutional claims, not unreasonably restrict access. For instance, in *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003), the court determined state habeas is available to litigate freestanding claims of factual innocence. In *State ex rel. Meier v. Stubblefield*, 97 S.W.3d 476 (Mo. banc 2003), the Court utilized state habeas to remand for resentencing a petitioner who did not get a direct appeal timely filed and where the time for a 30.03 motion had elapsed. In *State ex rel. Francis v. McElwain*, 140 S.W.3d 36 (Mo. banc 2004), this Court held that an inmate petitioning the court in a civil action should be excused from the financial filing requirements of the prison litigation reform act. In *Wallingford v. State*, *supra*, the Court rejected the state's argument that the movant's signature on a *pro se* motion was a jurisdictional requirement to proceed.

CONCLUSION

WHEREFORE, for the foregoing reasons, appellant requests that this Court reverse the judgment of the motion court dismissing his Rule 29.15 motion for post-conviction relief as untimely filed and remand this cause for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g) and Special Rule 361, I hereby certify that on this day, September 20, 2004, two true and correct copies of the foregoing brief and a floppy disk containing the foregoing brief were mailed postage prepaid to the office of the Office of the Attorney General, 1530 Rax Ct., Jefferson City, Missouri 65109. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed 31,000 words, 2,200 lines, or one hundred pages. The word-processing software identified that this brief contains 6,487 words, excluding the cover page, signature block, and certificates of service and of compliance. Finally, I hereby certify that the enclosed diskette has been scanned for viruses with McAfee Anti-Virus software and found virus-free.

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APPENDIX

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